Vilsan Raj a/l Chelliah v AmGeneral Insurance (M) Bhd

HIGH COURT (JOHOR BAHRU) — APPEAL NO JA-12B-22–06 OF 2017
MOHD IVAN JC
12 FEBRUARY 2018

Insurance — Action to recover — Denial by insurer — Appellant filed action for recovery against insurer — Respondent denied liability as insurer — Whether car insured by respondent — Whether respondent notified Road Transport Department of cancellation of insurance policy — Whether statutory requirements under s 102 of the Road Transport Act 1987 ('the Act') fulfilled — Whether respondent could avoid liability pursuant to notice given under s 96(2) of the Act — Road Transport Act 1987 ss 96(2) & 102

The present action arose from an accident involving the appellant and one Annatan a/l Govindasamy ('Annatan') who was insured by the respondent. The appellant had served notice under s 96(2)(a) of the Road Transport Act 1987 ('the Act') and filed an action at the sessions court against Annatan. Despite the summons being served to the respondent, there was no representation made resulting in default judgment being entered, and for damages to be assessed. The appellant was not satisfied with the damages awarded and had successfully appealed to the High Court. The respondent did not respond to the High Court order which compelled the appellant to file recovery proceedings in the sessions court. The respondent then filed application under O 14A r 1 and/or O 33 r 2 of the Rules of Court 2012 and the sessions court found in favour of the respondent, hence the present appeal. The respondent argued that Annatan's car was not insured by their company and claimed that they had notified the Road Transport Department ('the JPJ') regarding the cancellation of Annatan's private car policy through online submission which was the JPJ Inquiry System on 1 November 2013.

Held, allowing the appeal and reversing the decision of the sessions court with costs of RM5,000 subject to allocator:

(1) There was merit in the appeal to call for interference on appeal. The sessions court had not fully analysed and appreciated the factual circumstances of the present case when coming to a finding that the policy issued by the respondent had been validly cancelled. The response from the JPJ stated 'Not Ok', which was never challenged by the respondent, resulting in the respondent remaining on the JPJ's record as the insurer. Even after the claim herein had been made, the respondent had not disputed the same. This indifference must, at worst, be an

implied acceptance by the respondent that it did not dispute the position taken by JPJ not to allow the cancellation of the policy through the online facility. The respondent therefore had not made out a case that it had fulfilled the statutory requirements under s 102 of the Act. As the respondent remained on record as the insurer, they were not entitled to avoid liability pursuant to notice given under s 96(2) of the Act (see paras 41–44 & 47–48).

[Bahasa Malaysia summary

Tindakan ini timbul daripada kemalangan yang melibatkan perayu dan Annatan a/l Govindasamy ('Annatan') yang diinsuranskan oleh responden. Perayu telah menyampaikan notis di bawah s 96(2)(a) Akta Pengangkutan Jalan 1987 ('Akta') dan memfailkan tindakan di mahkamah sesyen terhadap Annatan. Walaupun saman telah disampaikan ke atas responden, tiada wakil dibuat yang mengakibatkan penghakiman ingkar dimasuki, dan untuk ganti rugi ditaksir. Perayu tidak berpuas hati dengan ganti rugi yang diawardkan dan berjaya merayu kepada Mahkamah Tinggi. Responden tidak memberi maklum balas kepada perintah Mahkamah Tinggi yang memerintahkan perayu memfailkan prosiding pengembalian di mahkamah sesyen. Responden kemudian telah memfailkan permohonan di bawah A 14A k 1 dan/atau A 33 k 2 Kaedah-Kaedah Mahkamah 2012 dan mahkamah sesyen mendapati telah menyebelahi responden, justeru rayuan ini. Responden berhujah bahawa kereta Annatan tidak diinsuranskan oleh syarikat mereka dan mendakwa bahawa mereka telah memberitahu Jabatan Pengangkutan Jalan ('JPJ') berhubung pembatalan polisi kereta Annatan melalui serah simpan atas talian iaitu Sistem Inkuiri JPJ pada 1 November 2013.

Diputuskan, membenarkan rayuan dan mengakas keputusan mahkamah sesyen dengan kos RM5,000 tertakluk kepada alokatur:

(1) Terdapat merit dalam rayuan untuk memanggil campur tangan atas rayuan. Mahkamah sesyen tidak menganalisis dan menghargai sepenuhnya keadaan faktual kes ini apabila tiba kepada dapatan bahawa polisi yang dikeluarkan oleh responden telahpun dibatalkan secara sah. Jawapan daripada JPJ menyatakan 'Not Ok', yang tidak dicabar oleh responden, telah mengakibatkan responden kekal dalam rekod JPJ sebagai penanggung insurans. Malah selepas tuntutan ini dibuat, responden tidak mempertikaikan yang sama. Sikap acuh tidak acuh ini harus, paling tidak, merupakan penerimaan secara tersirat oleh responden bahawa ia tidak mempertikaikan kedudukan yang diambil oleh JPJ untuk tidak membenarkan pembatalan polisi itu melalui kemudahan atas talian. Responden oleh itu tidak membuat kes bahawa ia telah memenuhi keperluan statutori di bawah s 102 Akta tersebut. Oleh kerana responden masih kekal atas rekod sebagai penanggung insurans, mereka tidak berhak untuk mengelak liabiliti menurut notis yang

diberikan di bawah s 96(2) Akta tersebut (lihat perenggan 41–44 & 47–48).]

Notes

For a case on denial by insurer, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 21.

Cases referred to

Eagle Star Insurance Co Ltd v Provincial Insurance plc [1993] 3 All ER 1, PC (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8; [2003] 4 CLJ 337, CA (refd)

Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd [2007] 7 MLJ 706, CA (refd)

Legislation referred to

Road Transport Act 1987 ss 90, 90(1), 96, 96(2), (2)(a), (2)(c), 102, 102(2)

Rules of Court 2012 O 14A r 1, O 33 r 2

Balaskanda a/l Thamotharam (Zaman & Assoc) for the appellant.
Tan Lee Kiat (Othman Hashim & Co) for the respondent.

Mohd Ivan JC:

[1] In this case, the appellant/plaintiff had been involved in an accident on 29 January 2014 when he was riding his motorcycle No FBH7588X which had collided with a car No JKA281 ('the car') driven by Annatan a/l Govindasamy.

[2] A check with the Road Transport Department being the regulating authority better known as Jabatan Pengangkutan Jalan ('JPJ'), revealed that as at March 2014, the car was insured with the respondent from 5 September 2013–4 September 2014.

[3] The appellant's solicitors had written a letter dated 14 March 2014 to Kurnia Insurans (M) Bhd (as the respondent then was) only to be told in a reply dated 7 May 2014 that the car was not insured with them at the time of the accident as the policy had been cancelled on 1 November 2013.

[4] Undeterred, the appellant's solicitors again wrote a letter dated 26 June 2014 to Kurnia Insurans (M) Bhd stating that the JPJ records showed that the car was insured by their company over the period 5 September 2013–4 September 2014, and that therefore the respondent was still liable under the policy.

[5] The respondent replied by letter dated 29 August 2014 referring to their earlier letter dated 7 May 2014 reiterating that they were not the insurer at the material time and that they shall close their file.

[6] The appellant's solicitors then gave notice under s 96(2)(a) of the Road Transport Act 1987 ('the RTA') and filed suit under sessions court Writ of Summons No A53KJ-1336–11 of 2014 against Annatan a/l Govindasamy as the owner of the car.

[7] Despite the summons being served on the respondent, there was no representation for the defendant in the sessions court matter resulting in default judgment being entered, and for damages to be assessed.

[8] It would appear that the appellant was not satisfied with the damages awarded and had successfully appealed to the High Court under Appeal No 12B-27–07 of 2015.

[9] The High Court order was served on the respondent requiring them to pay but to no avail.

[10] Hence, the commencement of recovery proceedings by the appellant as plaintiff against the respondent as defendant in sessions court Writ of Summons No JA-A53KJ-418–06 of 2016.

[11] At this stage, the respondent became proactive and took out an application under O 14A r 1 and/or O 33 r 2 of the Rules of Court 2012 for the sessions court to decide the following questions of law:

(a) whether the insurance policy issued by the respondent to Annatan a/l Govindasamy was still valid/in force at the date of the accident on 29 January 2014; and

(b) whether the respondent is statutorily liable to pay on the plaintiff/appellant's claim.

[12] Resorting to this procedure is to save time, as the Court of Appeal had stated in the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8; [2003] 4 CLJ 337.

[13] How this procedure can be successfully applied must relate to identifying a question of law, where there is no dispute of facts as had been explained in the case of *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2007] 7 MLJ 706 as follow:

> Order 14A of the RHC provides for an accelerated final disposal of an action at an

interlocutory stage to save time and expense which would otherwise arise if the action were to proceed to full trial. It empowers the court to make a final determination of a question of law without the need of an application under O 33 r 5 for the determination of a preliminary issue. Two requirements are however prescribed for its exercise:

(i) the question of law or construction is suitable for determination without full trial of an action; and

(ii) such determination will be final as to the entire cause or matter or any claim or issue therein.

[14] The notice of application was allowed by the sessions court resulting in this appeal.

[15] The brief grounds of the sessions court were as follows:

(a) the respondent had submitted the cancellation of the policy to the JPJ online service;

(b) the unutilised portion of the premium had seemingly been refunded pro-rata to the insured, Annatan a/l Govindasamy; and

(c) to order the respondent to pay up under those circumstances would be unjust.

[16] We must be mindful that under s 96 of the RTA, there is a wider purpose to be served by that social legislation as follows:

96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks

(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

(2) No sum shall be payable by an insurer under subsection (1) —

(a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;

(b) in respect of any judgement, so long as execution is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section, the expression 'material' means of such a nature as to influence the judgement of a prudent insurer in determining whether he will take the risks, and if so at what premium and on what conditions, and the expression 'liability covered by the terms of the policy' means a liability but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(6) In this Part, reference to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

[17] In order for s 96 of the RTA to be applied, a litigant must have the

means to ascertain who the insurer of a vehicle was at the time of the accident in order to issue a notice under s 96(2). A

[18] A search conducted with JPJ to check with, and extract from, their records would the normal practice. The JPJ search results would be, at the very least, prima facie evidence that a vehicle has been covered under a policy of insurance against third party risks. B

[19] That insurance is required under s 90(1) of the RTA, which states as follows: C

> Subject to this Part, it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part. D

[20] It will be on the basis of submission of proof of coverage under third party insurance, usually either for a period of six or 12 months, that a licence will be issued by JPJ that will enable the vehicle concerned to ply public roads. E

[21] It is a matter of course that the period of the licence, or what is commonly referred to as 'road tax' for a vehicle to be permitted to run on public roads will correspond with the period of insurance taken.

[22] If such insurance coverage were to be terminated early for any reason, whether by the insured cancelling or the insurer revoking such policy, it would become necessary for the authorities (JPJ) to be notified as this will also determine and affect the right of the vehicle to continue to have licence or 'road tax' to be allowed to run on public roads. F G

[23] This duty to inform JPJ being the regulating authority comes under s 102 of the RTA, which is reproduced as follows:

> 102 Surrender of certificate on cancellation of policy
>
> (1) Where a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected and the policy is cancelled by mutual consent or by virtue of any provision in the policy, the person to whom the certificate was delivered shall, within seven days from taking effect of the cancellation, surrender the certificate to the insurer or, if it has been lost or destroyed, make a statutory declaration to that effect, and if he fails so to do he shall be guilty of an offence. H I
>
> (2) Where a policy has not been issued following the issue of a cover note, or a policy has been cancelled, transferred to another person or altered to cover the insured vehicle for use for a purpose other than that for which it

A

> was originally issued, it shall be the duty of the insurer to inform the Director by whom the vehicle insured by such policy or cover note was registered, and if he fails so to do he shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three hundred ringgit.

B

[24] The duty to furnish such information to JPJ will surely be to enable JPJ to update and maintain the currency of its records for public consumption.

[25] What may transpire between the respondent and its insured, Annatan a/l Govindasamy, may be one thing. However, their dealings must fit into all of
C thelegislative framework of ss 90, 96(2) and 102 of the RTA in order that the regulating authority JPJ will know, and also others at large who may be interested or affected would also be in the know.

D **[26]** In its submission, the respondent maintains that it had fulfilled/complied with all the requirements/duties as pursuant to ss 96(2)(c) and 102(2) of the RTA in that 'The respondent as an insurance company/insurer has forthwith notified the JPJ regarding the said cancellation of the private car policy which is in accordance to/in compliance with the
E requirement under s 102(2) of the RTA 1987'.

[27] In support of its case, the respondent had cited the English case of *Eagle Star Insurance Co Ltd v Provincial Insurance plc* [1993] 3 All ER 1, in particular to the following excerpts:

F

> ... The defendant's insurers had cancelled the policy taken out by the defendant before the accident but had failed to take steps to obtain its surrender and therefore remained statutorily liable for third party risks under s 12a of the Bahamas Road Traffic Act.

G

> Prior to the accident on 22 December 1985 Eagle Star had cancelled the policy in accordance with condition 7 but had failed to comply with the requirements of s 12(2)(c) due to an administrative error. Eagle Star therefore remaine liable to Mr Simms under the Act ...

H **[28]** The respondent claimed to have forthwith notified the JPJ regarding the cancellation of the private car policy through online submission which was the JPJ inquiry system on 1 November 2013, which can be found at p 96 of the record of appeal.

I **[29]** I have scrutinised the saidprint screen of the 'JPJ Submission Enquiry Screen' pertaining to its submission of the cancellation of the policy.

[30] While it was true that the submission was sent on 1 November 2013 at 10:49:34, the status of the submission stated that it was 'REPLIED' very soon

after submission on the 1 November 2013 at 11:16:08, but interestingly, the reply status remarked 'NOT OK'. A

[31] This would surely explain why, despite whatever the respondent may have expected, that the submission for cancellation of the policy for Annatan a/l Govindasamy was 'Not Ok', and hence the insurance was not cancelled and remained in force as far as JPJ — and the rest of the world at that, was concerned. B

[32] Nothing had seemingly been done by the respondent in follow up to this 'Not Ok' status response by JPJ, leading to the situation where the policy had remained in force as far as JPJ's records were concerned. C

[33] For the respondent not to conclusively ensure that it no longer remained on public record as the insurer of the car would be at its peril. D

[34] In the final analysis, the car was involved in an accident on public road and no issue had been raised or taken as to the right of the car to be on public road. This must surely follow that the car *did* have its licence or road tax, which surely begets the question as to the basis for the licence or road tax. E

[35] If pursuant to the intended, where I would not say purported, cancellation of the insurance policy issued by the respondent, there should rightly be another insurance policy taken out by the owner of the car to enable it to have or maintain its licence or road tax. F

[36] This would also explain why the car was still running on private roads, as the respondent's insured, Annatan a/l Govindasamy, had never offered any explanation or stated that pursuant to the cancelation, another policy had been purchased thus enabling the car to be issued with 'road tax' to be allowed on public roads. G

[37] In any event, if there was such other third party insurance coverage, it would surely have found its way into the records of JPJ such that there may even be a case of double insurance shown on JPJ's records. H

[38] All those checking through JPJ's system would thus be fairly apprised that the policy issued by the respondent to the car was still valid and in force. There was certainly nothing to suggest that there was any other insurance policy in force at the material time to allow the car to be licensed to be on public roads. I

[39] In the sessions court, any defence to challenge the liability of the driver,

A Annatan a/l Govindasamy, would normally be initiated by the insurer, which in this case may not have been done as the insurer (the respondent herein) may have thought unnecessary thinking that the insurance policy had been cancelled.

B **[40]** That would have been a missed opportunity to introduce evidence that the defendant, Annatan a/l Govindasamy, had cancelled the policy issued by the respondent and had taken out another policy.

C **[41]** All matters considered, I find that there is merit in the appeal to call for interference on appeal.

[42] It would appear that the sessions court had not fully analysed and appreciated the factual circumstances of this case when coming to a finding D that the policy issued by the respondent had been validly cancelled. The response from JPJ stated 'Not Ok', which was never challenged or disputed by the respondent, resulting in the respondent remaining on record as the insurer.

E **[43]** Even after the claim herein had been made, the was nothing to show that the respondent had ever queried JPJ as to why the respondent had remained in JPJ's records as the insurer of the car despite putting up its notice of cancellation online, or as to the 'Not Ok' status response.

F **[44]** This indifference must, at worst, be an implied acceptance by the respondent that it did not dispute the position taken by JPJ not to allow the cancellation of the policy through the online facility.

[45] Taking cognisance of another aspect of this case, the car would appear G to have remained licensed to be on public roads resulting in its involvement in an accident, where there was nothing to suggest that another third party insurance policy was in force to facilitate this.

[46] The appellant had, in their submission, challenged some questionable H aspects in the documentation for the cancellation of the policy, which I find in no need for elaboration as the end result was that the cancellation put through the online system was not accepted by JPJ.

[47] I would therefore find that the respondent had not made out a case that I it had fulfilled the statutory requirements under s 102 of the RTA.

[48] As the respondent remained on record as the insurer of the car, I find that they are not entitled to avoid liability pursuant to notice having been given under s 96(2) of the RTA.

[49] The questions posed in para 11 above put up in the O 14A application are answered in the affirmative.

[50] The appeal is therefore allowed and the decision of the sessions court dated the 29 May 2016 is hereby reversed with costs of RM5,000 subject to allocator.

Appeal allowed; decision of sessions court reversed with costs of RM5,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar